

STATEMENT OF STEVEN HENRY
ASSOCIATE LEGISLATIVE DIRECTOR
PARALYZED VETERANS OF AMERICA
FOR THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING
APPEALS REFORM: WILL VA'S IMPLEMENTATION
EFFECTIVELY SERVE VETERANS

January 30, 2018

Chairman Roe, Ranking Member Walz, and members of the Committee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to offer our views on the implementation of the Department of Veterans Affairs' (VA) appeal reform and if in fact it will effectively serve veterans.

PVA employs a highly-trained force of over 70 service officers across the nation who develop veterans' claims for both member and non-member clients. These frontline employees spend a minimum of two years in specialized training. We maintain a national appeals office staffed by attorneys and legal interns who represent clients at the Board of Veterans' Appeals (Board). We also have attorneys who practice before the Board, the Court of Appeals for Veterans Claims (CAVC), and the United States Court of Appeals for the Federal Circuit. Of all the major Veteran Service Organizations (VSO), only PVA offers such continuity of representation throughout subsequent appellate review.

Our most important attribute, though, is that our service officers and attorneys consistently advocate for catastrophically disabled veterans. Complex claims are the norm, not the exception. As we attempt to bring greater efficiency to the claims and appeals system, our perspective is geared toward ensuring that the due process rights of the most vulnerable among us—those most deserving of benefits—are not watered down for the sake of expediency.

In July 1933 the Board of Veterans Appeals, often referred to as the Board, was established providing veterans with appeals rights. Members of the Board of Veterans Appeals were appointed by the Administrator with the approval of the President. The Board's mission is to conduct hearings and to provide decisions on veteran's appeals in a timely manner. The Board's jurisdiction extends to all questions in matters involving a

decision by the Secretary of Veterans Affairs under a law that affects a provision of benefits by the Secretary to veterans, their dependents or their survivors.

The appeals process for VA benefits is a complex, non-linear process, which is set in law and is unique from other appeals processes across the federal and judicial systems. Notably, the current VA appeals process is a continuous open record that allows the claimant to submit new evidence or make a new argument at any point throughout the process. Furthermore, VA's duty to assist requires VA to assist with the development of additional evidence submitted by the claimant to assist with the adjudication of their claim. Generally, VA must issue another decision specifically addressing the newly submitted evidence.

When a claimant exhausts their appeal rights at the local Regional Office (RO) they may choose to appeal their claim to the Board. To do so they must file a Form 9 which certifies their case to the Board and provides their claim with a docket date. All cases at the Board are heard in docket date order.

In fiscal year 2015, the Board received and docketed 69,957 appeals and anticipated the docketing of 88,183 appeals in fiscal year 16. The Board's cycle time which measures the average time from the date an appeal is certified to the Board until a decision is rendered was 160 days in FY15. This does not include the time spent with service organizations who represent the veterans and assist them with their appeal.

In reaction to the increasing backlog of appeals claims, instead of addressing the lack of proper development and adjudication at the local Regional Offices, VA instead chose to modify the appeals process at the Board. VA did so through a collaboration with Congressional leadership by introducing the Veterans Appeals Improvement and Modernization (VAIMA) Act of 2017. In the legislation, Congress introduced language that provided VA with the authority to establish a test program, or pilot, to assist with the implementation of the VAIMA. VA's pilot, already in effect, is called the Rapid Appeals Modernization Program (RAMP).

PVA has several concerns with RAMP. First and foremost is the fact that it is not a pilot because of VA's plan to extend RAMP to all veterans in varying stages of appeals. It is clear that RAMP is an effort by VA to facilitate implementation of the VAIMA in an effort to reduce the appeals backlog. In general, a "pilot program" is defined as a small scale preliminary study conducted in order to evaluate feasibility, time, cost, adverse events, and effect size (statistical variability) in an attempt to predict an appropriate sample size and improve upon the study design prior to performance of a full-scale program. To date, VA has distributed thousands of notices to veterans proposing the choice to "opt-in" to the RAMP program.

RAMP is not a small scale project. Furthermore, VA did not share any benchmarks for which the project will be tested prior to its implementation. How will the pilot be determined a success? In actuality, there was very little communication with VSOs in regards to when and how the program was going to be implemented.

With this new program claimants will have the ability to opt in if they receive a less than favorable decision on their original claim. The RAMP program provides the veterans with three lanes:

- Supplemental Claim Lane: Veterans will select this option if they have additional evidence that is “new and relevant” to support granting their claim.
- Higher Level Review Lane: Veterans will select this option if they have no further evidence to submit but believe there was an error in the initial decision.
- The last choice is to have your claim recertified to the Board.

The RAMP process is completely separate from the Board. It is not clear how opting into RAMP will affect their docket date if they later elect to go to the Board.

PVA has serious concerns with the claimants having to withdraw their appeals particularly with veterans who choose to participate in RAMP although their appeals have been remanded for further development by the Board. In 1988 the Court of Appeals for Veterans Claims often referred to as the Court, was established for exclusive jurisdiction to review decisions of the Board of Veterans Appeals. Decisions rendered by the Court can establish precedent. One decision in particular was *Stegall v. West*. In *Stegall* the Court held that any remand instructions by the Board must be adhered to by the Regional Office and that the Board must ensure that its remand

instructions are complied. This protection is important as it further compels VA to comply with its duty to assist.

If a veteran withdraws their appeal(s) they will no longer have the protection under *Stegall* because the Board will no longer have jurisdiction over the claimants claim. This puts increased responsibility on the veteran or their representative to ensure VA has fully complied with its duty to assist. Unfortunately, most veterans do not have the knowledge, access to records, or wherewithal to scrutinize whether the Board's remand instructions have been complied with.

Ensuring that VA provide adequate exams by the proper specialist is a common error in claims that face continued denial in the current appeals process. PVA represents veterans who are the most catastrophically disabled and whose claims are often extremely complex. More often than not, veterans with complex claims that include any aspect of Special Monthly Compensation (SMC), must be seen by specialists, most likely a neurologist, not nurse practitioners or physicians practicing general medicine. Without a specialist conducting the exam it is quite possible the most important details will be overlooked which could result in a significant monetary loss for the veteran.

As part of the pilot, VA is sending notices to veterans across the country giving them the option to opt-in to the new program that would provide them a quicker decision. PVA is concerned that many veterans will make the choice to opt-in based on the fact that the basis of the program is to provide quicker decisions. Unfortunately this program is not

for everyone and could actually have a very detrimental effect on the veteran's claim.

There have been instances where a PVA Service Officer (SO) was contacted by a veteran who informed them that they had opted-in to the RAMP program.

Another of PVA's concerns is VA's intention to implement the program as quickly as possible without determining resources needed for the program to be successful. An example would be the fact that if a veteran opts-in to the RAMP program, exhausts all of their lanes and still receives an unfavorable decision, the veteran is unable to appeal their claim to the Board until February, 2019. It is possible that veterans will be angry that they must wait until 2019 to certify their appeal to the Board even though this was explained in the initial letter to the veteran explaining the process. Unfortunately, the explanation was found half way down on page four. Even the most experienced advocate could easily miss this notification. VA must improve their means of notifying the veterans of these regulations that could have a serious detriment to their claims. Furthermore, legal action against VA could be possible for failing to adhere to current due process regulations.

It's no secret VA has a very difficult job. At the end of the day there are many stakeholders VA must answer to. Unfortunately with this responsibility VA will often make kneejerk decisions and will implement programs prior to having the resources in place to ensure the program's success. The RAMP program is no different. VA is pushing RAMP out so quickly that even VA employees in Regional Offices across the country have very little confidence in the effectiveness of the program. Furthermore,

there has been little to no communication between VA and VSO's in regards to providing the necessary training and tools to our field employees to assist them with providing accurate information to their clients. Like all other VA programs and initiatives there must be constant communication between VA and VSO's to ensure the veteran's needs are met and their voices are heard.

PVA is also concerned with the stages of appeals that VA is targeting with RAMP. PVA has received notice that for the month of February 2018, 120 veterans represented by PVA will receive opt-in notices. Out of those, 76 were in the Notice of Disagreement (NOD) stage, 16 had submitted their Form 9's, 20 had been certified advanced and 7 are in remand status. Veteran's whose cases are in remand status should absolutely not be contacted nor should they be provided the option to opt-in because they are already in such an advanced stage in their appeal.

PVA is certain that the RAMP program has not been implemented for the veteran's benefit but for VA's. When asked to opt-in to the RAMP program the veteran must agree to withdraw all appeals that would have been appealed to the Board. By doing so it would give the impression that appeals were being reduced, when in reality they are just on hold.

As you know, PVA has an extensive national network of SO's who work with our members and other veterans to prosecute their VA claims. Some of our SO's report a culture in their Regional Offices where adjudicators are not comfortable favorably

exercising their full authority in the current system. Changing a law is hard, but changing a culture is much harder. If VA does not work to change the culture of its decision makers, and if VA managers do not allow their decision makers to exercise their full authority, then it won't matter whether you call it a Decision Review Officer, a Higher Level Review, an appeal or anything else. To get the benefits of appeals modernization, VA must change more than titles and regulations, it must also change the proverbial hearts and minds of its employees.

We are concerned that, in its rush to implement RAMP, VA has not fully complied with Congress's intent. The act envisioned a comprehensive plan followed by a pilot to test assumptions used in the plan, but the RAMP program began before the comprehensive plan was fully developed. We urge continued oversight to ensure the congressional intent is followed.

Chairman Roe, Ranking Member Walz, and members of the Committee, thank you for the opportunity to submit our views on the RAMP and Appeals Modernization Programs. I would be happy to answer any questions the Committee may have.

Information Required by Rule XI 2(g) of the House of Representatives

Pursuant to Rule XI 2(g) of the House of Representatives, the following information is provided regarding federal grants and contracts.

Fiscal Year 2018

Department of Veterans Affairs, Office of **National Veterans Sports Programs & Special Events** — Grant to support rehabilitation sports activities — \$181,000.

Fiscal Year 2017

Department of Veterans Affairs, Office of **National Veterans Sports Programs & Special Events** — Grant to support rehabilitation sports activities — \$275,000.

Fiscal Year 2016

Department of Veterans Affairs, Office of **National Veterans Sports Programs & Special Events** — Grant to support rehabilitation sports activities — \$200,000.

Disclosure of Foreign Payments

Paralyzed Veterans of America is largely supported by donations from the general public. However, in some very rare cases we receive direct donations from foreign nationals. In addition, we receive funding from corporations and foundations which in some cases are U.S. subsidiaries of non-U.S. companies.

Biography of Steven J. Henry

Steven Henry is an Associate Legislative Director for Paralyzed Veterans of America (PVA) representing PVA to federal agencies, most notably the Department of Veterans Affairs (VA) on issues regarding veteran's benefits. Prior to joining PVA, Steven represented The American Legion at the Board of Veterans Appeals, served as American Legion's only service officer in Washington, DC and conducted site visits to VA Medical Centers across the United States to assess them for timeliness and quality of care.

Steven currently represents PVA on VA's VSO Advisory Council on preventing veteran suicide.

Steven grew up in Severna Park, Maryland and enlisted into the Marines at the age of 17. He started his career as a veterans advocate in 2010 with the American Legion. Steven currently resides in Bowie, Maryland with his wife Jennifer and his son Ethan.